

2-10-06

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE

CLIFFORD SLOAN THRASHER, JR, and
DARLENE SMITH THRASHER,

Debtors.

CASE NO. 04-93810

CHAPTER 7

JUDGE DIEHL

ORDER DENYING TRUSTEE'S MOTION FOR RECONSIDERATION

This case presents the issue of whether a Chapter 7 Trustee can recover from Debtors the non-exempt funds that were in their joint bank account at the time they filed their Chapter 13 case but which were used by Debtors during the Chapter 13 case. Additionally, the Trustee raises the issue of whether the Court may provide for the revocation of a debtor's discharge without the commencement of an adversary proceeding.

The case came before the Court on December 15, 2005 on a motion filed by the Trustee styled as "Motion for Order Directing Debtors to Pay Over Estate's Funds Which They Converted, Upon Pain of Denial or Revocation of Discharge Pursuant to 11 U.S.C. Sections 727(a)(6)(A) and 727(d)(3)" (the "Motion"). The Trustee had also filed a "Motion for Order Directing Debtor's Attorney to Correct Deficiencies and for Examination of Fees." After the non-evidentiary hearing, at which the Trustee and Debtor's counsel were both present, the Court entered an Order denying the Trustee's Motions without prejudice. On December 21, 2005, the Trustee filed a Motion to Reconsider the Court's Order.

UNDERLYING FACTS

Debtors Clifford Sloan Thrasher and Darlene Smith Thrasher (“Debtors”) filed a joint Chapter 13 Petition and Plan on May 7, 2004. At their request, Debtors’ case was converted to a Chapter 7 case on June 9, 2004. The section 341(a) meeting was held on July 13, 2004. The interim Chapter 7 Trustee, Paul Anderson, Jr., became the permanent Trustee at the conclusion of that meeting. No complaint objecting to either Debtor’s discharge was filed and on September 21, 2004 an Order of Discharge was issued.

The Trustee conducted Rule 2004 examinations of the Debtors in August 2004. The Trustee filed an objection to Debtors’ claim of exemption which was resolved by Consent Order in September 2004. One year later, in September 2005, the Trustee filed the instant motions. The Trustee attached to the Motion a copy of one page of a bank statement for a joint account of Debtors which reflects a balance of \$3,286.48 on the date that the Chapter 13 case was filed. This is the sum sought by the Trustee. At the time the case was converted to Chapter 7, however, the bank account had a negative balance of \$16.20.¹ The Schedules and Statements filed in connection with the Chapter 13 case do not reflect this bank account in any way.

Since the conversion of the case to Chapter 7, Debtors have divorced and now live apart. Mr. Thrasher has moved outside the state of Georgia. Ms. Thrasher resides in Georgia and asserts that the bank account at issue was used solely by her former husband. The Debtor husband has been unresponsive to his attorney’s requests and has failed to return a proposed amendment to the schedules which would list the account and exempt its balance.

¹The closest date to the date of conversion for which a balance is reported on the bank statement is June 7, 2004.

The Trustee filed his Motion and submitted a proposed Order to the Court and did not set the matter for hearing. Upon review of the Motion, the Court determined that a hearing was necessary because of the nature of the relief sought by the Trustee under the facts of the case. Debtors' attorney appeared at the hearing in opposition to the Motion. At the hearing, the Trustee asserted that other judges in this district granted similar motions which he had filed. None were cited at the hearing. After the Court entered its Order denying the Trustee's Motion, the Trustee filed a Motion for Reconsideration and attached to the Motion an Order entered by Hon. Joyce Bihary in *In re Raheem*, Case No. 01-75727. The Trustee argues that 11 U.S.C. § 105 authorizes the Court to enter such an Order.

DISCUSSION

The threshold issue raised in this case is whether the Chapter 7 Trustee can recover funds that were property of Debtors' estate at the time Debtors filed their Chapter 13 case but which were no longer in Debtors' possession, custody or control at the time of the conversion to Chapter 7. Because the Court has determined that such funds are not "property of the Chapter 7 estate" subject to turnover, the other issues raised by the Trustee are moot.

This case began as a Chapter 13 case and the property of the Chapter 13 estate is determined with reference to 11 U.S.C. § 1306 which includes the property which is described by 11 U.S.C. § 541 as well as property acquired after the commencement of the Chapter 13 case. However, when a case is converted from Chapter 13 to Chapter 7, the relevant reference is 11 U.S.C. § 348(f)(1)(A). "[T]he property of the estate in the chapter 7 case is that property which was property of the estate as of the filing of the original chapter 13 petition, to the extent such property still remains in the debtor's possession or control on the date of conversion." Collier on

Bankruptcy ¶ 1306.04 (15th ed. rev. 2005); *see also In re Woodland*, 325 B.R. 583, 585 (Bankr. W.D. Tenn. 2005); *In re Zamora*, 274 B.R. 268, 272 (Bankr. W.D. Tex. 2002); *In re Wegner*, 243 B.R. 731, 734 (Bankr. D. Neb. 2000); *Gresham v. Lunberman's Mut. Cas. Co. (In re Hainz)*, 245 B.R. 347, 350 (Bankr. E.D. Mo. 1999). Assets that may have been disposed of between the filing of the Chapter 13 case and its conversion to Chapter 7 do not come into the estate upon conversion. *See id.*

Prior to the 1994 amendments to Title 11 which added Section 348(f), Section 348(a) controlled and provided that conversion “does not effect a change in the date of the filing of the petition, the commencement of the case or the order for relief.” This led to a split in the circuits as to whether post-petition earnings of the Chapter 13 estate were property of the debtor or property of the Chapter 7 estate upon conversion. The Seventh Circuit in *In re Lybrook*, 951 F.2d 136, 138 held that “the Chapter 13 estate passes unaltered into Chapter 7 upon conversion.” *See In re Calder*, 973 F.2d 862, 866 (10th Cir. 1992)(agreeing with the holding in *Lybrook*); *In re Lindberg*, 735 F.2d 1087, 1090 (8th Cir. 1984) (stating that “[t]he bankruptcy courts are in general agreement that in a case converted from chapter 13 to chapter 7, the property of the estate consists of all property in which the debtor has an interest on the date of conversion”), *cert. denied*, 469 U.S. 1073, 105 S. Ct. 566, 83 L. Ed. 2d 507 (1984). In contrast, the Third Circuit opined that after-acquired property should not be part of the post-conversion Chapter 7 estate. *In re Bobroff*, 766 F.2d 797, 803 (3d Cir. 1985); *see also In re Winchester*, 46 B.R. 492, 495 (9th Cir. B.A.P. 1984) (“logic dictates that the date of conversion [from Chapter 13 to Chapter 7] is the controlling date on which to determine . . . property of the Chapter 7 estate”). The 1994 legislation ended the debate by specifying that (1) only property of the estate

which existed on the date of the original petition came into the Chapter 7 estate and (2) property which the debtor had used or sold during the Chapter 13 case was likewise not property of the Chapter 7 estate.

The legislative change follows analytically from the fact that a Chapter 13 debtor, pursuant to 11 U.S.C. § 1303, is given the powers of a trustee under section 363(b), (d), (e), (f) and (l) to use and sell property of the estate, even out of the ordinary course of business. Indeed, that is what happens in the typical Chapter 13 case: other than the funds which are committed by the Chapter 13 Plan to Trustee payments or payments to secured creditors, a Chapter 13 debtor uses property of the estate to fund his post-petition expenses. See generally, Keith M. Lundin, Chapter 13 Bankruptcy, 3d Ed. § 44.1 (2000 & Supp. 2004).

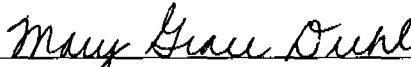
The Trustee in his Motion requested the Court to direct the Debtors to pay over \$3,286.48, the balance of the checking account on the date the Chapter 13 case was filed. The Trustee, however, is entitled to turnover, if at all, only the funds in the account at the time the case was converted to Chapter 7. According to the bank statement attached to the Trustee's Motion, there were no funds in the account on the date of conversion. In fact, the bank statement indicates that the Debtors' account was overdrawn by \$16.20. The funds that were in the account prior to June 9, 2004 are not property of the Chapter 7 estate. Therefore, the Trustee is not entitled to turnover of the funds. See 11 U.S.C. §§ 542 and 363.

The Court does not need to reach the procedural question of how a Trustee recovers funds which are property of the estate from a debtor, which is governed by Bankruptcy Rule 7001(1) and whether the action of a Trustee falls within the stated exception. The Court also does not reach the issue of the appropriateness of the entry of an Order which purports to revoke a

debtor's discharge under Section 727(d) without the filing of an Adversary Proceeding as provided in Rule 7001(4). Accordingly,

IT IS ORDERED that Trustee's Motion for Reconsideration is hereby **DENIED**.

IT IS SO ORDERED, this 10th day of February, 2006.



MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE